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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN ADAME,

Defendant and Appellant.

B144019

(Los Angeles County
Super. Ct. No. BA188294-01)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lance Ito, Judge. Affirmed.

R. Clayton Seaman, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Marc E. Turchin, Acting Senior Assistant Attorney General, John R. Gorey, Supervising Deputy Attorney General, and Daniel Rogers, Deputy Attorney General, for Plaintiff and Respondent.

Ruben Adame was convicted of first degree lying-in-wait murder of Kelly Romero. He was sentenced to life without the possibility of parole (“LWOP”) plus 140 months in state prison. On appeal, Adame challenges the sufficiency of the evidence supporting his first degree lying-in-wait murder conviction and the lying-in-wait special circumstance conviction. He also contests the constitutionality of his lying-in-wait special circumstance conviction. As set forth below, we find sufficient evidence supported Adame’s lying-in-wait murder conviction and the lying-in-wait special circumstance conviction; we also conclude Adame’s Eighth Amendment challenges of his special circumstance conviction fail for the reasons set forth below. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Because Adame challenges the sufficiency of the evidence supporting his convictions, we set forth the background facts in detail.

Relationship Between Kelly Romero and Appellant, Ruben Adame. In 1997, 15-year-old Kelly Romero began dating Ruben Adame, a fellow student at Eagle Rock High School. In September of 1998, Romero and Adame had a baby boy. Romero lived with her parents in an apartment and Adame would frequently visit their home.

Approximately one month after the birth of their child, Adame became physically abusive toward Romero. On June 16, 1999, after various acts of violence toward Romero over several months, she ultimately obtained a temporary restraining order against Adame. Adame was properly served with the restraining order on June 18, 1999.

Romero reported the restraining order against Adame to the Eagle Rock High School personnel. Adame was no longer a student at the school. As a result, a campus security guard escorted Romero to her mother’s car every day after school.

The day of the murder. On June 22, 1999, Adame went to Eagle Rock High School where he was spotted in the school cafeteria carrying a brown paper bag. Security personnel escorted Adame off of the campus.

After school that day, Romero and her mother, Ana Ramirez, saw Adame standing at a bus stop near their home. He was carrying a black bag. Upon arriving home, Romero took the baby inside the apartment. Ramirez saw Adame walk by as she put oil in her car. Adame stopped to ask Ramirez if he could see Romero and his son. Ramirez explained he could not see them because of the restraining order, and Adame left. Thereafter, Ramirez also left the apartment complex to pick up her younger children from school. Romero stayed inside the apartment with her baby.

After Ramirez left, Adame returned to the area outside of Romero's apartment and approached Michael F., an 11-year-old resident of the apartment complex. Adame told Michael F. to knock on Romero's door to ask if Adame could see his baby. Michael F. did so, and Romero went to the window to speak with Adame.

During the conversation that followed, Adame asked to see his child. Romero briefly brought the baby to the window. As Romero turned to lay the baby down, Adame took a gun out of the black bag he carried and put the gun in his right-hand pocket. When Romero returned to the window a conversation ensued; Romero told Adame that he needed counseling.

At some point Adame took out his gun, aimed it at Romero, and shot at her through the window. The bullet entered the right side of her chest and lodged in the left side of her back. Romero screamed. She went to the phone and called 9-1-1. Adame then ripped off the window screen, climbed into the apartment, and began searching for Romero.

Adame heard Romero on the phone with the 9-1-1 operator. Romero had sequestered herself inside of her bedroom. Adame shot at the doorknob to get into the room but it did not open. Romero then opened the door and they began to argue. Adame followed Romero into the living room and continued to fight with her. Romero ran from the apartment and Adame chased her toward the parking lot. He then lifted the gun and shot Romero twice; in her neck and in the back of her head. Romero fell to the ground.

Adame then returned to the apartment to reload his gun. He walked back to the parking lot where Romero lay, lifted her head and told her to look at him. Adame put the

loaded gun in his mouth and pulled the trigger. The shot was not fatal but Adame was injured by the gunfire. Romero, however, died of the cumulative effect of the multiple gunshot wounds.

Adame's Conviction. Adame was tried and convicted of, among other charges, first degree lying-in-wait murder of Romero.¹ Adame was further convicted of the special circumstance of intentionally killing the victim by means of lying-in-wait and using a firearm in perpetrating the murder.

Adame timely appeals the judgment.

DISCUSSION

I. Issues on Appeal

Adame makes the following contentions on appeal:

1. Insufficient evidence supports Adame's first degree lying-in-wait murder conviction and the lying-in-wait special circumstance conviction.
2. The lying-in-wait special circumstance conviction is unconstitutional pursuant to the Eighth Amendment because it fails to narrow the class of murderers that are death eligible and fails to heighten the prosecution's burden of proof.

¹ Adame was also convicted of making terrorist threats toward Ramirez, the victim's mother; battery upon Romero; corporal injury to his child's parent, Romero; first degree residential burglary of Romero's home; personally inflicting great bodily injury upon Romero under circumstances involving domestic violence; disobeying domestic relations court order; and dissuading a witness by force or threat.

II. Sufficient Evidence Supported Adame’s First Degree Lying-In-Wait Murder Conviction As Well As Lying-In-Wait Special Circumstances.

Adame contends there was insufficient evidence to convict him of either first degree lying-in-wait murder or of the lying-in-wait special circumstance.²

A. Standard of Review for Sufficiency of the Evidence.

When sufficiency of the evidence is challenged on appeal our role in reviewing the evidence is limited. We must determine whether, on the entire record, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

On appeal, the evidence is viewed in the light most favorable to the party prevailing below and presumes the existence of every fact the trier could reasonably deduce from the evidence, in support of the judgment. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) It is our task to ensure that the evidence presented at the trial level is *substantial*; hence, it must be “of ponderable legal significance ... reasonable in nature, credible, and of solid value.” (*People v. Johnson, supra*, 26 Cal.3d 557, 576.) However, it is the trier of fact – the trial judge or jury – that has sole authority to determine the credibility of witnesses and the truthfulness of the facts presented. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) Therefore, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*People v. Johnson, supra*, 26 Cal.3d 557, 576.)

² For the purpose of addressing the sufficiency of the evidence on appeal, we only need determine whether sufficient evidence supported the lying-in-wait special circumstance. When the sufficiency of the evidence of both lying-in-wait murder and the lying-in-wait special circumstance are challenged, the California Supreme Court has focused “on the special circumstance because it contains more stringent requirements.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 388.) Thus, “if ... the evidence supports the special circumstance, it necessarily supports the theory of first degree murder.” (*Ibid.*)

Applying the foregoing principles, we look to the entire record for substantial evidence that supports the conviction.

B. Evidence Of The Special Circumstance: Lying-In-Wait.

Adame contends the evidence was insufficient to support the conviction of the lying-in-wait special circumstance. We disagree.

The lying-in-wait special circumstance is defined as “an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage....” (*People v. Morales* (1989) 48 Cal.3d 527, 557.)

The element of concealment goes beyond the traditional view a perpetrator must be physically concealed from view before attacking his or her victim. In fact, concealment may be shown where the “defendant’s true intent and purpose were concealed by his actions and conduct. It is not required that he be literally concealed from view before he attacks the victim.” (*People v. Sims* (1993) 5 Cal.4th 405, 432-433.) With this in mind, substantial evidence demonstrates Adame concealed his purpose the day of the murder.

Adame concealed his purpose for visiting Romero when he got the gun and hid it in the black duffel bag on the day of the murder. When Adame arrived at Romero’s apartment complex, he also attempted to physically conceal himself from Romero’s view when he sent a young neighbor to her door. A reasonable jury could have deduced that by using the small child as bait, Adame perhaps planned to force his way into the apartment or even attempt to shoot at Romero when she opened the door. However, Romero was scared for her safety and thus did not open the door for the child. Adame admitted he had inadvertently positioned himself too close to the door, Romero saw him, and she had no choice but to talk to him. Adame, after having been discovered by Romero, had no choice but to speak with Romero. He asked to see his child. Although it

is possible Adame wanted to see his child, a reasonable juror could have viewed this request as a ploy to position Romero in a position more vulnerable to Adame and his semi-automatic gun.

After Adame asked to see his son, he waited for Romero to bring the baby to the window. When Romero turned away from the window to put the baby down, Adame moved the gun from the black duffel bag to his pocket. At some point during the conversation that ensued when Romero returned to the window, she told him that he needed counseling. Thereafter, Adame shot Romero in the chest through the window.

Adame claims that he did not fire the gun when Romero first came to the window; he shot her only after they talked and argued; after she told him that he needed counseling. He claims that he was acting out of sudden rage. In *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, the court noted, “it suffices if the defendant’s purpose and intent are concealed by his actions or conduct, and the concealment of purpose puts the defendant in a position of advantage, from which the fact finder may infer that lying in wait was part of the defendant’s plan to take the victim by surprise.” Although Adame’s version is possible, other facts could convince a reasonable jury Adame was not acting out of sudden rage; that he planned to shoot Romero and concealed his intent to do so. Adame brought a loaded concealed weapon in a black duffel bag to Romero’s home. Thereafter, when Romero had her back turned Adame repositioned the gun for ready use. Further, Adame placed Romero in a particularly vulnerable position when he asked her to bring the baby to the window. These facts support a reasonable inference Adame concealed his intent to shoot Romero, waiting to catch her in her most vulnerable moment – when she had her child close at hand.

Adame also claims that he did not conceal his purpose in visiting Romero because he was forthright in his requests to see his son. However, the fact that Adame asked to see his baby does not negate the possibility that he was concealing a further purpose – to kill Romero. In fact, Adame’s persistent requests to see the infant support a reasonable inference his requests amounted to a subterfuge to carry out a plan to slay Romero.

Adame also asserts there was not a sufficient period of “watchful waiting” for an opportune time to act before he shot Romero. However, in our view, a reasonable trier of fact could find Adame spent a substantial portion of the day of the murder watching Romero; waiting to catch her alone. Adame went to Romero’s school the afternoon of the murder hours before he spoke with Romero. Later that day, Adame was spotted at a bus stop near Romero’s home; from that vantage point he saw Romero arrive at her home and also waited there for her mother to leave Romero with her baby in the apartment. Then, immediately before the murder, Adame waited outside of Romero’s apartment while he sent the young neighbor to the door, attempting to hide himself from her view. These facts are sufficient evidence to infer Adame spent a substantial period watchfully waiting.

In addition, Adame claims he fired the first shot due to “an explosion of violence or an act of animal fury.” However, there is sufficient evidence the shooting was the culmination of plan rather than a “sudden outburst of provoked passion.” (*People v. Ceja, supra*, 4 Cal.4th at p. 1143.) In *People v. Ceja*, the court addressed facts similar to those of the instant case. There, evidence of a concealed purpose and watching and waiting, combined with evidence of the defendant’s previous history of violence toward the victim and his concealment of a loaded handgun all supported an inference that the shooting was a culmination of a plan rather than a sudden outburst. (*Ibid.*) In the present case, the above evidence supports a reasonable inference of concealed purpose as well as watchful waiting. Moreover, Adame had a prior history of violence toward Romero, evidenced by police reports and the restraining order against Adame. Finally, Adame concealed a loaded handgun; first in a black duffel bag; later in his pocket. Based on these facts, a jury could conclude Adame planned to catch Romero by surprise, place her in a position of disadvantage, and kill her.

Finally, a jury could find Adame sought and obtained a position of advantage before shooting Romero. “As long as the murder is immediately preceded by lying-in-wait, the defendant need not strike at the first available opportunity, but he may wait to maximize his position of advantage before taking his victim by surprise.” (*People v.*

Ceja, supra, 4 Cal.4th at p. 1145.) Adame first tried to get Romero to open the door when he sent the young neighbor to knock on the door. When his plan failed and Romero did not open the door, Adame spoke with her through the window. Once the boy left and Adame was alone with Romero, he asked to see the baby. When Romero complied by bringing the baby to the window, Adame had obtained the position of advantage. Positioning Romero with her child created a position of ultimate vulnerability for her. Adame then waited for Romero to turn around to put her baby down, at which time he moved the gun to his pocket. Adame seized this position of advantage to ready himself for an attack.

Considering all of the evidence, we conclude there was sufficient evidence for a rational trier of fact to find Adame committed first degree lying-in-wait murder as well as the lying-in-wait special circumstance.

III. Adame Has Not Demonstrated His Conviction And Sentence Violated The Eighth Amendment.

Adame argues the jury instructions defining lying-in-wait murder (CALJIC No. 8.25) and the lying-in-wait special circumstance (CALJIC No. 8.81.5) violate the Eighth Amendment. Adame asserts two related, yet distinct, Eighth Amendment claims.

First, Adame points out that to withstand Constitutional scrutiny under the Eighth Amendment a special circumstance must “narrow” the class of offenders eligible for the death penalty. Adame contends, however, CALJIC Nos. 8.25 and 8.81.5 are virtually identical, and case law has treated those instructions as equivalents. Therefore, Adame maintains, the lying-in-wait special circumstance is unconstitutional because it fails to satisfy the Eighth Amendment “narrowing requirement” (“The Narrowing Requirement Claim”).

Second, Adame asserts that because the lying-in-wait murder charge and the lying-in-wait special circumstance were treated as functional equivalents, he was automatically subjected to a heavier punishment of LWOP (for the conviction of lying-in-wait murder with the special circumstance of lying-in-wait), rather than the lesser punishment of 25

years to life (for a lying-in-wait murder conviction *absent* the special circumstance allegation). Adame claims the failure to distinguish between the lying-in-wait special circumstance and the lying-in-wait murder charge lowered the prosecution's burden of proof by making the proof for the charge carrying the lesser sentence (that, is the lying-in-wait murder) sufficient for proof of the charge carrying the greater sentence (that is, lying-in-wait murder with the lying-in-wait special circumstance) ("The Burden of Proof Claim").

We examine each of these claims in turn.

A. The Narrowing Requirement Claim

The Attorney General responds, *inter alia*, Adame does not have standing to assert this claim because the Eighth Amendment "narrowing requirement" does not apply to LWOP sentences, and instead only applies to death sentences. Consequently, the Attorney General argues that because Adame did not receive the death penalty, he has suffered no injury upon which to base his Eighth Amendment claim. The Attorney General is correct.

Any party challenging the death penalty on Eighth Amendment grounds must have Article III standing. (*Whitmore v. Arkansas* (1990) 495 U.S. 149, 161.) To establish an Article III case or controversy, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." (*Allen v. Wright* (1984) 468 U.S. 737, 751.) Further, "a litigant first must clearly demonstrate that he has suffered an 'injury in fact.' . . . The complainant must allege an injury to himself that is 'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent. . . ." (*Whitmore v. Arkansas, supra*, 495 U.S. at p. 155; citations omitted.)

Adame claims he suffered an "injury" under the Eighth Amendment because the special circumstance of lying-in-wait, which make him eligible for the death penalty, did not satisfy the "narrowing requirement." In our view, Adame's contention is based on the misconception the "narrowing requirement" applies to "death eligible offenders" who

receive an LWOP sentence as well as those who receive a sentence of death. In the context of the Eighth Amendment “narrowing requirement,” however, LWOP is not the equivalent of a death sentence.

State sentencing guidelines must distinguish between persons sentenced to death and those not sentenced to death pursuant to the Eighth Amendment. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) However, this rule has not been extended to require states to distinguish between criminals sentenced to LWOP and those sentenced to LWP. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 995.) The Supreme Court in *Harmelin* addressed the issue of whether individualized sentencing, which is required in capital cases, should be extended to cases where the defendant receives LWOP. There, the court stated that, “the penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total revocability.” (*Ibid.*) Further, the court noted that “in some cases ... there will be negligible difference between life without parole and other sentences of imprisonment – for example, a life sentence with eligibility for parole.” (*Id.* at p. 996.)

Furthermore, the California Supreme Court in *Sand v. Superior Court* (1983) 34 Cal.3d567, 572 decided whether state funds for expert witnesses were available for a defendant that had been charged with a special circumstance crime although the prosecutor was not seeking the death penalty.³ In *Sand*, the court held that this was not a “capital case.” The *Sand* court further noted its decision “... is consistent with Supreme Court decisions holding that the death penalty is fundamentally and qualitatively different from any other punishment, including life without parole.” (*Ibid.*) The *Sand* court rested its decision on the United States Supreme Court’s holding in *Woodson v. North Carolina* (1976) 428 U.S. 280 (plurality opinion), where the Supreme Court distinguished between capital and non-capital cases to determine whether individualized sentencing is required by the Eighth Amendment in non-death penalty cases. In *Woodson*, the court stated that

³ Funds to pay expert witnesses, investigators and jury consultants are statutorily provided by the state to those defendants charged with a “capital crime” under Penal Code section 987.9.

“[t]his conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” (*Id.* at p. 305.)

Perhaps the most persuasive decision by the California Supreme Court on this point came in *People v. Zimmerman* (1984) 36 Cal.3d 154, 157. In *Zimmerman*, the court decided whether a mandatory minimum sentence of LWOP pursuant to multiple special circumstance convictions was cruel and unusual under the Eighth Amendment. The court noted that the imperative constitutional safeguards provided to death penalty defendants are not in place for those who receive LWOP. In addressing LWOP, the court stated, “We do not underestimate the gravity of the penalty in question: it is, and is intended to be, the heaviest penalty short of death. Yet it remains fundamentally different from death in the one respect so often emphasized in Eighth Amendment jurisprudence: time and again the high court opinions have reasoned that capital punishment is ‘final’ and ‘irrevocable’ in the obvious sense that after it is carried out there is no possibility of rehabilitation, clemency, or belated relief because of factual mistake or change in the law. [Citations.]” (*Id.* at pp. 158-159.) The California Supreme Court in *Zimmerman* further discussed the distinction made by the United States Supreme Court in *Lockett v. Ohio* regarding LWOP. (*Lockett v. Ohio* (1978) 438 U.S. 586.) The *Lockett* court stated that “[a] variety of flexible techniques—probation, parole, work furloughs, to name a few—and various post conviction remedies may be available to modify an initial sentence of confinement in noncapital cases.” (*Id.* at p. 605.) The United States Supreme Court “emphasize[d] that in dealing with standards for imposition of the death sentence *we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes.*” (*Id.* at p. 605, fn. 13; italics added.)

As the foregoing demonstrates, LWOP sentence and the death penalty are treated differently in this context because LWOP is not as serious a punishment as the death penalty.

In sum, because Adame received an LWOP sentence, he has not suffered the injury he claims with respect to the narrowing requirement. Absent an injury, he lacks standing to make this Eighth Amendment challenge.

B. The Burden of Proof Claim

Adame claims his LWOP sentence violates the Eighth Amendment because there was no heightened burden of proof upon the prosecution to distinguish between the special circumstance and the underlying offense of first degree lying-in-wait murder. Therefore, Adame contends without the heightened burden of proof, his underlying first degree murder conviction automatically subjected him to the increased minimum sentence of LWOP.⁴ Stated another way, Adame argues he received the greater LWOP sentence based on the lesser burden of proof for the underlying murder charge. We disagree.

The requirements of these two separate murder allegations have been distinguished as “slightly different”. (*People v. Ceja, supra*, 4 Cal.4th at p. 1140, fn. 2.) The California Supreme Court in *People v. Carpenter* (1997) 15 Cal.4th 312, 388 [Court reviewed sufficiency of the evidence for both lying-in-wait murder and the special circumstance of lying-in-wait], noted, “if ... the evidence supports the special circumstance, it necessarily supports the theory of first degree murder.” This result is true because the special circumstance contains “more stringent requirements.” (*Ibid.*) If the prosecutor proves elements of the lying-in-wait special circumstance, then the elements of underlying lying-in-wait murder are also proved; the underlying murder charge is essentially “absorbed” into the special circumstance charge. Thus, contrary to what Adame argues, proof of the underlying lying-in-wait murder charge *does not* automatically satisfy the elements of the lying-in-wait special circumstance and subject him to the increased minimum LWOP sentence. In addition, Adame *has not* been

⁴ He points out a conviction of the underlying first degree murder charge carries a lesser sentence of 25 years to life, not LWOP.

subjected to the LWOP sentence based on the lesser burden of proof for the underlying murder charge. Instead, he received the LWOP sentence because the prosecution proved the “more stringent requirements” of the special circumstance.⁵

Finally, even assuming, *arguendo*, the lying-in-wait special circumstance charge and murder charge are equivalent as Adame claims, an Eighth Amendment analysis of these two terms of imprisonment still fails to support Adame’s claim. The United States Supreme Court in *Harmelin v. Michigan*, *supra*, 501 U.S. at pages 997-998, discussed the constitutional test for noncapital punishments under the Eighth Amendment. There, the court emphasized that the only review for noncapital sentences is one of *proportionality*. (*Ibid.*; italics added.) The court went on to state “... the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter is ‘properly within the province of the legislatures, not the courts.’” (*Id.* at p. 998.) Most importantly, in addressing whether LWOP was unconstitutional, the court stated that “[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.” (*Id.* pp. 994-995.)

Therefore, even if the statutes and jury instructions for the two lying-in-wait charges are functionally equivalent, a sentence of LWOP has properly been determined by the California Legislature to be an appropriate sentence for a person convicted of the special circumstance of lying-in-wait; the greater crime. Additionally, since LWOP has “been employed in various forms throughout our nation’s history,” although an LWOP sentence “may be cruel,” it is “not unusual in the constitutional sense.” (*Harmelin v. Michigan*, *supra*, 501 U.S. at pp. 994-995.)

⁵ We also note Adame asserts the merger of the elements of the special circumstance and the underlying murder charge violated the due process clause of the Fourteenth Amendment and the right to a jury trial under the Sixth Amendment because it “[i]mproperly lighten[ed] the prosecution’s burden of proof or shift[ed] the burden of proof to the defense.” Because we conclude the prosecution presented sufficient evidence and carried its evidentiary burden of proof for the special circumstance, we also

DISPOSITION

The judgment is affirmed.

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WOODS, J.

We concur:

LILLIE, P.J.

JOHNSON, J.

conclude Adame suffered no Fourteenth Amendment due process violation or Sixth Amendment jury trial deprivation.